Petition

81-1897

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JACK HOLLAND ANTHONY
Petitioner,

v.

UNITED STATES OF AMERICA
and
VERNON V. SISNEY,
Respondents.

* * * * * *

JACK HOLLAND ANTHONY,
Petitioner,

v.

HONORABLE LEE R. WEST,
and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is mandamus power properly exercised by a Court of Appeals to compel a district court to withdraw a post-trial discovery order based solely on a disagreement with the trial court's relevancy determination?

2. In a prosecution under the wiretap statute, 18 U.S.C. § 2511 (1)(a), in which the alleged wiretap victim testifies for the government, do the privacy provisions of Title III protect tapes of the alleged victim from discovery by the defense as containing material for cross examination, thus prevailing over the defendant's due process and sixth amendment confrontation rights?

3. If the nature of an item seized incident to a lawful arrest indicates that the item was assembled by hand, can a search warrant issue for the suspect's home solely on the basis of the affiant's unfounded speculation that the assembly took place at the suspect's home, or is the requirement of probable cause to search a home undermined by such a procedure?

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Petitioner Jack Holland Anthony prays that a writ of certiorari issue to review three related judgments of the United States Court of Appeals for the Tenth Circuit. The first judgment affirmed the judgment of conviction of the United States District Court for the Western District of Oklahoma (Honorable Lee R. West, presiding) sentencing petitioner Anthony to imprisonment for three years, thirty months suspended. After a jury trial on a five-count indictment, petitioner Anthony was convicted of one count of unlawful wiretapping in violation of 18 U.S.C. § 2511(1)(a). Petitioner is enlarged on bail.

The second judgment of the Court of Appeals reversed a post-trial interlocutory discovery order of the district court, entered in consideration of a motion for a new trial, which denied Vernon V. Sisney, one of the persons whose conversations were allegedly illegally intercepted, standing to intervene and move to preclude Anthony from examining tapes of Sisney conversations in the possession of the government and undisclosed at trial.

The third judgment of the Court of Appeals is a writ of mandamus directing the trial judge, Honorable Lee R. West, to vacate his post-trial interlocutory order, also entered in consideration of the new trial motion, requiring production of certain files of the Office of Professional Responsibility of the Department of Justice (OPR) and granting discovery of them to petitioner Anthony.

OPINIONS BELOW

The Court of Appeals' opinion affirming the conviction also addresses the issues raised by the post-trial intervention of Dr. Sisney. This opinion is reported as *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981), and reprinted as Appendix A.

The unreported order on denial of rehearing is reprinted as Appendix E. The opinion of the Court of Appeals in support of the writ of mandamus, not yet reported, and the writ itself are reprinted as Appendix B. The district court's order concerning the intervention of Dr. Sisney and production of the OPR files, dated August 25, 1981, is unreported and reprinted as Appendix C. The district court's opinion and order concerning an assertion of executive privilege by the Attorney General of the United States as to the OPR files, dated October 6, 1981, is unreported and reprinted as Appendix D. The Appendix also contains a related memorandum order of the district court, dated September 15, 1981, and reprinted as Appendix F.

JURISDICTION

The judgment of the Court of Appeals affirming the conviction and upholding Dr. Sisney's claims was rendered on November 24, 1981. A timely petition for rehearing was denied on February 5, 1982. The judgment and writ of mandamus of the Court of Appeals concerning the OPR files issued on February 12, 1982. Petitioner Anthony submits this consolidated petition in accordance with Supreme Court Rule 19.4. On March 29, 1982, Justice Byron R. White extended the time for filing a petition to review the first opinion to April 13, 1982.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

18 U.S.C. § 2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communications has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be reviewed in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be a violation of this chapter.

U.S. Constitution, fourth amendment. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This series of cases arises from intense conflict among mental health professionals in the Oklahoma City community. At the time of his arrest on February 21, 1980, Jack Anthony was studying to become a practicing psychologist with the Barkouras Foundation. The Foundation serves as a nonprofit agency engaged in community service, educational programs, scholarly publications and research into mental health problems and theories of treatment. Tr. 3236-64.[1] The Foundation's innovative approach to mental health, and its quick success, led to animosity toward its affiliates by other elements of

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[1]Unless otherwise indicated, transcript citations reference the trial.

the Oklahoma City mental health community, including respondent Sisney.

The Criminal Case: The Search.

On February 20, 1980, a Southwestern Bell Telephone Company employee noticed a piece of equipment attached to the company's wires in a residential section of Oklahoma City. Investigation disclosed an electronic device, probably a wiretap, on the home telephone of Dr. Richard Sternlof, a psychologist. Tr. 214-21.

Federal agents staked out the area around the telephone stanchion. Although there is some conflict in the testimony, even among the government witnesses, Jack Holland Anthony was indisputably arrested on the scene. He was near a fishing tackle box containing the device, was wearing gloves, and had a blank cassette tape in his possession which would have fit the cassette recorder in the tackle box. Tr. 523-39.

Anthony was arrested; the car he was driving was searched and more blank tapes were found there. Tr. 419-25.

Within hours of the arrest, and before Anthony could return home, an FBI agent obtained a warrant to search his home. The affidavit in support of the warrant contained the allegation that the agent "had reason to believe" tools necessary for assembly and electronic equipment would be found in Anthony's home. The affidavit described the telephone lineman's discovery of a listening device, the device itself, verification that no court-ordered wiretap existed, the facts of Anthony's arrest, and a physical description of the exterior of Anthony's home. There was no indication of when Anthony had last been at the address, no allegation suggesting factual basis for believing that evidence was there rather than somewhere else, and no allegation that anyone else had been seen coming into or going out of the home.

The agents seized a quantity of electrical and electronic equipment, blank and recorded tapes, file folders, photographs and other materials indicating that Anthony had been engaged in surveillance of Dr. Sternlof, Dr. Sisney and Dr. Jerry Lucas, a dentist. Tr. 1660-88.

Anthony was indicted in five counts, charging violations of 18 U.S.C. § 2511(1)(a) in tapping the home phones of the three doctors, two of whom had two phone numbers.

Anthony's trial counsel moved before trial to suppress the fruits of the search, and Judge West denied the motion. After a jury verdict of guilty on one count[2] the Court of Appeals affirmed on the search issue, holding that it is reasonable to "assume" that evidence of an assembled device seized incident to an arrest can be found in the home of the accused. App. 8a.

The Criminal Case: The Trial.

The government relied in large part on the circumstances of Anthony's arrest, but chose to introduce the testimony of the alleged wiretap victims, Drs. Sternlof, Sisney and Lucas. Each man admitted a substantial professional and personal bias against the Barkouras Foundation. Tr. 2429-2578; Tr. 2872-2922; Tr. 2699-2767. Although perhaps unnecessary to the government's proof, this evidence exposed the larger context of Drs. Sternlof's and Sisney's antagonism toward the Barkouras Foundation and its affiliates, and turned the focus of the trial on the primary issue of the case, Jack Anthony's state of mind and intent.

Jack Holland Anthony took the stand and testified at length. By the fall of 1979, he was a trustee of the Foundation and became aware of threats to the Foundation and to his own connection with the Foundation's work. In October 1979, one

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[2]The jury failed to agree on four counts and a mistrial was declared.

Kitty Duncan shared with him a tape recording she had made of an alarming telephone conversation with one Susie Pritchett, an Assistant United States Attorney, in which Pritchett made various scandalous and irrational allegations about the Barkouras Foundation. Tr. 3289-3318.[3] In January, 1980, Anthony met one Carol Sherman who provided information that Drs. Sternlof and Sisney were conspiring to drive Dr. George Barkouras and the Barkouras Foundation out of business. Tr. 3228-90. Among the items provided were tape recordings of conversations involving Drs. Sisney and Sternlof. Anthony was told by Sherman that these tapes were lawfully obtained and that she had the consent of the spouse of one of the subscribers on the line being intercepted. Anthony's activity on February 21, 1980 was in reliance on Sherman's representations of legality. Tr. 3450-52. The jury returned a verdict of guilty on one count and failed to agree on the others.

The Motion for a New Trial.

Based upon evidence which came to the attention of Anthony through discovery in a related civil case, a motion for a new trial on grounds of newly discovered evidence was filed on his behalf.

The motion included allegations that the government was in possession of material which should have been disclosed under *Brady v. Maryland,* 373 U.S. 83 (1967) and the *Jencks Act.* The motion also attached exhibits indicating that the government had deliberately misled the court and the jury concerning

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[3]Petitioner is informed and believes that the text of this conversation is contained in the *in camera* OPR files said to have been examined by the Court of Appeals in the mandamus proceedings. The text of the conversation itself was attached to the original OPR complaint, and the response to the complaint indicated that Assistant U.S. Attorney Pritchett and an FBI agent were disciplined. These representations are based upon publicly available materials on the OPR investigations. The complete OPR file is part of the sealed *in camera* record.

an astounding degree of bias and hostility on the part of government attorneys, which bias had infected the fairness of the proceedings against Anthony. Indeed, one of the exhibits to the motion for a new trial documented a statement by a government official politically connected to the Carter Administration, which included a reckless assertion that the official used his political influence to have a judge appointed to the Tenth Circuit Court of Appeals, and that he would influence the court's treatment of Anthony's appeal of his conviction. Motion dated April 14, 1981, Exhibit A. Another exhibit to the same motion documented the official's involvement in the appointment of the U.S. Attorney in charge of Anthony's prosecution, and an admission by the official that he discussed the Anthony prosecution and his hostility toward affiliates of Anthony with the prosecutor during a weekend trip before the trial.

The motion for a new trial was under active consideration by the trial judge for several months. The court spent extensive time reviewing *in camera* exhibits, considered extensive briefing by the parties, heard oral argument and conducted a series of chambers conferences on the motion in contemplation of the necessity for an evidentiary hearing. During the course of these proceedings a federal agent filed an affidavit totally at odds with representations made during trial concerning whether certain tapes in the possession of the government were reviewed for *Brady* and *Jencks* purposes. Order of May 12, 1981.

Concerned over the apparent misrepresentation by government counsel during trial, on August 25, 1981, the district court ordered production of previously undisclosed tapes of Dr. Sisney and others to petitioner's counsel under a strict protective order limiting use of the materials to argument on the new trial motion. The same order, reprinted at Appendix C,

directed production of certain OPR files relating to an investigation of misconduct of government attorneys in the preparation and prosecution of the charges against Anthony. The order provided the government with an opportunity to assert the executive privilege if it chose to do so and ultimately the Attorney General filed an affidavit asserting the claim. In its order of October 6, 1981, the trial court held the privilege did not apply. *See* Appendix D.

After filing an untimely notice of appeal, the government sought review of the October 6 order by way of mandamus.

Without addressing the executive privilege issue raised by the government in defense of producing the OPR files, the Court of Appeals issued a writ of mandamus directing the district court to withdraw the August 25 order, finding the OPR files "irrelevant" to the pending motion. In a separate opinion the Court of Appeals reversed the order on disclosure of the tapes, and announced the broad rule that a defendant charged with illegal wiretapping is precluded from using the potentially illegal evidence to impeach a government witness.

The factual background of this case is complex, overlain with a long history of antagonism and ill will by various persons against affiliates of Anthony. The important issues we present stand out clearly, however. A distinguished trial judge became concerned that Jack Holland Anthony might not have received a fair trial, and he began to issue orders compelling disclosures which would aid Anthony in establishing his right to a new trial. Without awaiting the conclusion of these proceedings, the Court of Appeals twice intervened and on the basis of an incomplete record ordered the trial judge to desist from his quest for fairness in the context of a post-trial motion under Rule 33.

Meanwhile, the Court of Appeals affirmed Anthony's conviction, rejecting a well-founded argument based upon an unlawful entry into his home by federal agents.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S ISSUANCE OF THE WRIT TO COMPEL WITHDRAWAL OF A DISCOVERY ORDER ON RELEVANCY GROUNDS IS A DRASTIC AND DANGEROUS EXTENSION OF THE MANDAMUS POWER IN DEROGATION OF THE TEACHINGS OF THIS COURT AND AT ODDS WITH THE APPROACH OF ALL THE OTHER CIRCUITS.

In *Will v. United States,* 389 U.S. 90 (1973), this Court held that a writ of mandamus was not properly issued to vacate a portion of a pre-trial order to produce a bill of particulars in a criminal case. Emphasizing the traditional role of the writ to control the exercise of jurisdiction and power by a district court, the Court noted that it has "never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal." *Id.* at 98. Recently, this Court reiterated the limits of the extraordinary remedy of mandamus and affirmed the power and discretion of a trial court to order a new trial. *Allied Chemical Corp. v. Daiflon, Inc.,* 449 U.S. 33 (1980).

Here, the Tenth Circuit went beyond the power it asserted in *Daiflon* and interfered with the trial court's preliminary finding that certain materials were relevant to a pending motion for a new trial based on newly-discovered evidence and worthy of disclosure to defense counsel for purposes of argument.

Other circuits have granted wide discretion to trial courts to enter discovery orders, *see, e.g., United States v. Bailey,* 550 F.2d 1099, 1100 (8th Cir. 1977); and to consider newly discovered evidence in support of a new trial motion, *see, e.g., United States v. Bermudez,* 526 F.2d 89, 100-01 (2d Cir. 75),

cert. denied, 425 U.S. 970 (1976). The spirit of *Will v. United States* has required the denial of the extraordinary writ of mandamus to correct arguably erroneous interlocutory orders within a trial court's discretion. *See In re United States,* 598 F.2d 233 (D.C. Cir. 1979); *International Business Machines Corp. v. United States,* 480 F.2d 293, 293 n.6 (2d Cir. 1973), (en banc), cert. denied, 416 U.S. 979 (1974). The Tenth Circuit's determination that the discovery order here was "clearly erroneous," App. 35a and thus within the mandamus power is a substantial departure from this accepted and consistent course of decision.

Even if a distinction remains between advisory and supervisory mandamus in the wake of *Will,* the Tenth Circuit's order cannot be justified as a special exercise of supervisory power. There has certainly been no pattern of abuse by Judge West, *see La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957) and the disputed discovery order did not involve an issue of first impression requiring immediate resolution. *Schlagenhauf v. Holder,* 379 U.S. 104 (1964). Indeed, the Tenth Circuit's exercise of mandamus power to disturb an interlocutory relevancy determination in consideration of a new trial motion, before the record is fully developed, invades the sheltered discretion of a trial court in consideration of such matters established by *Daiflon* and subjects a trial court's consideration of the need for a new trial to constant appellate scrutiny.[4]

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[4]The motion for a new trial was filed after the appeal from Anthony's conviction was in the Tenth Circuit. The district judge had the power to consider the motion and was doing so until the Court of Appeals stopped him. At the end of the trial judge's consideration, he would have had the option of denying the motion or of asking for a remand from the Tenth Circuit for the purposes of granting it. This procedure is outlined in *e.g., United States v. Siviglia,* slip op., Nos. 79-1004 and 79-2180 (10th Cir., June 15, 1981).

II. THE COURT OF APPEALS' HOLDING THAT PROVISIONS OF THE WIRETAP STATUTE PRECLUDE DISCLOSURE OF ARGUABLY ILLEGAL TAPES EVEN IF THEY CONTAIN BRADY MATERIAL IS IMPORTANT TO THE ADMINISTRATION OF PROSECUTIONS UNDER THE STATUTE.

Because of government misrepresentation concerning the government's discharge of its *Brady* obligations, the trial court ordered disclosure of certain Sisney tapes to the defense for purposes of arguing the new trial motion. Sisney had testified as a government witness at trial and certain of his taped conversations were introduced. The Court of Appeals found that Sisney was an "aggrieved person" within the meaning of 18 U.S.C. § 2518(10)(a) with standing to selectively object to disclosure of his conversations even if they revealed falsehoods in his trial testimony.

None of the provisions of the Omnibus Crime Control and Safe Streets Act of 1968 bear directly upon the question of disclosure in this case, even when we assume the conversations were illegally intercepted.

Title 18 U.S.C. § 2511(1)(c) provides that unless specifically provided for in Chapter 119 of that Title, the knowing disclosure of the contents of an illegal interception of a telephone conversation is a five year felony. There is no specific provision which deals with disclosure during the course of a prosecution under the Act. Section 2515 provides that no illegally intercepted telephone conversation may be admitted in evidence, although such was surely done in this case. *See* Government Exhibits 3A, 4A, 12 and 13.[5] Section 2520 of

[5]The District of Columbia Circuit has held that illegally intercepted wire communications cannot even be introduced in evidence during a prosecution under the Act, by the government or the defense, and regardless of whether such a prohibition forecloses a proper area of cross-examination. *United States v. Liddy*, 509 F.2d 428, 444 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 911 (1975).

the Act provides a civil cause of action for the interception or disclosure of unlawful electronic surveillance. The Statute provides, however, that it is a complete defense if the disclosure is pursuant to a court order.

In *Davis v. Alaska,* 418 U.S. 308 (1974) the defendant's sixth amendment right to cross-examination overrode a witness's statutory right to confidentiality in juvenile records. Just last term this Court stated that "[t]here is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *United States v. Havens,* 446 U.S. 620, 626 (1980). This Court found that concern for the integrity of the fact-finding process demanded that law enforcement officials be allowed to use the fruits of their illegality to impeach the direct testimony of a defendant. *Id.* at 627-28.

The legislative history of Title III indicates that Congress intended to make the sanctions applicable to privately intercepted communication, under Title III, parallel to existing fourth amendment restrictions on law enforcement use, citing *Walder v. United States,* 347 U.S. 62 (1954). *See* S.Rep. No. 1097 90th Cong. 2d Sess. reprinted in [1968] U.S. Cong. & Ad. News 2185. The conflict presented by this case between the nondisclosure rights of an alleged wiretap victim and the due process and confrontation rights of a defendant prosecuted under the act was apparently not anticipated by Congress. It merits resolution by this Court.

III. THE COURT OF APPEALS' HOLDING THAT A WARRANT TO SEARCH A PRIVATE HOME CAN ISSUE SOLELY ON THE BASIS OF INFERENCES DRAWN FROM ITEMS SEIZED INCIDENT TO ARREST CONFLICTS WITH OTHER CIRCUITS.

The affidavit supporting the search of petitioner Anthony's home did not contain any factual basis for the affiant's belief that evidence of criminality could be found there.

In upholding the search of the residence, the Tenth Circuit reasoned that if the assembly of seized evidence could be inferred, the home of an apprehended suspect could be searched. The broad consequences of such an inference, however, places this Court's well reasoned and carefully drawn distinction between probable cause to arrest and probable cause to search a home in jeopardy. *See Steagald v. United States,* 449 U.S. 378 (1981); Note, *Arrests On Third Party Premises: Reasonableness Under The Fourth Amendment,* 18 Am.Crim.L.Rev. 449, 452-54 (1982); Comment, *Search and Seizure In The Supreme Court: Shadows On The Fourth Amendment;* 28 U.Chi.L.Rev. 664, 687 (1961). For example, if loading a gun can be characterized as assembly, any person from whom a loaded weapon is seized incident to arrest would have his or her home subject to search. The First Circuit rejected such a view in *United States v. Charest,* 602 F.2d 1015 (1st Cir. 1979) where it held an affidavit for a search warrant defective absent factual indications of the likely presence of a handgun on defendant's premises. Similarly, the Fifth Circuit in *United States v. Flanagan,* 423 F.2d 745 (5th Cir. 1970) held the mere possession of burglary proceeds insufficient to authorize a search for further proceeds at defendant's home without some reliable evidence to support a connection between the proceeds and the defendant's residence.

The rule fashioned by the Court of Appeals, that seizure from a suspect of an "assembled" device alone warrants a search of the suspect's home conflicts with the approach of the First and Fifth Circuits and suggests resolution by this Court.

CONCLUSION

For all of the foregoing reasons, it is respectfully prayed that the writ for certiorari be granted.

Respectfully submitted,

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Dated: April 13, 1982

*Counsel acknowledges the assistance of Jack Holland Anthony, now a second year law student in California.

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 80-1953, 81-2020

JACK HOLLAND ANTHONY,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

JACK HOLLAND ANTHONY,
Defendant,

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VERNON V. SISNEY,
Intervenor-Appellant.

Appeal From the United States District Court
For the Western District of Oklahoma
(D.C. No. CR-80-35-W)

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Andy Coats of Crowe & Dunlevy, Oklahoma City, Oklahoma, for Vernon V. Sisney.

Before BARRETT, DOYLE and LOGAN, Circuit Judges.

BARRETT, Circuit Judge

These are consolidated appeals. Jack Holland Anthony appeals from his conviction under 18 U.S.C.A. § 2511(a), unlawful interception of wire communications. Dr. Vernon V. Sisney appeals from the District Court's order denying him standing to oppose Anthony's motion for discovery in aid of Anthony's motion for new trial and order requiring discovery

of certain tapes which were the product of Anthony's unlawful interception of wire communications.

Anthony was charged with illegally wiretapping the telephones of Dr. Richard Sternlof, Dr. Vernon V. Sisney and Dr. Jerry Lucas. Trial was had before a jury in the United States District Court for the Western District of Oklahoma. The jury convicted Anthony of illegally tapping Dr. Sternlof's phone. However, the jury was unable to reach a verdict on the remaining charges involving the tapping of Dr. Sisney's and Dr. Lucas' phones.

Anthony does not challenge the sufficiency of the evidence. Thus, at the risk of oversimplifying this rather involved situation, the relevant facts are as follows.

At the time of his arrest, Anthony was a graduate student studying for a Ph.D. in psychology. In the course of his studies, Anthony came to be associated with a Dr. George Bakouras and the Bakouras Foundation. Suffice it to say that there existed a good bit of hostility between Dr. Bakouras and other psychologists in Oklahoma City, including Dr. Sternlof and Dr. Sisney.

On February 20, 1980, a Southwestern Bell Telephone Company employee discovered wiretapping equipment on a telephone pole which serviced Dr. Sternlof's home. Upon investigation, it was determined that there was no court authorization for surveillance of the Sternlof's phone. The telephone company then informed the F.B.I. of the situation.

That evening F.B.I. agents set up surveillance of the area surrounding the telephone pole. In the early morning hours of February 21, 1980 the agents observed Anthony approach the area in a 1980 Oldsmobile Cutlass. They then observed Anthony bend over a fishing tackle box containing the wiretapping device. When the agents arrested Anthony he was wearing yellow latex gloves and had a cassette tape in his possession.

A subsequent search of the automobile, pursuant to a warrant, yielded more blank cassette tapes and a CB radio with magnetic mount antenna. In addition to the search warrant for the car, a search warrant for Anthony's residence was issued on the basis of an affidavit sworn to by F.B.I. Agent Coy A. Copeland. The search of the house resulted in the seizure of a quantity of electrical and electronic equipment, blank and recorded cassette tapes, file folders bearing the names of Dr. Sternlof and Dr. Sisney, photographs of the Sternlof and Sisney homes, and various other incriminating evidence. The fruits of this search led to the discovery of taps on the phones of Dr. Sisney and Dr. Lucas.

At trial, Anthony testified in his own defense. Anthony testified that in January of 1980 he was contacted by a woman identifying herself as Carol Sherman. Ms. Sherman allegedly told Anthony that she was conducting an investigation at the request of a spouse of an opponent of the Bakouras Foundation. Ms. Sherman allegedly provided Anthony with information tending to establish a conspiracy between Dr. Sternlof and Dr. Sisney to drive Dr. Bakouras out of business. Ms. Sherman enlisted Anthony's help in conducting her investigation. Anthony claims that he believed that the wiretapping activity was being conducted with the consent of the spouse of one of the subscribers to the intercepted lines. He claimed that on the night of his arrest Ms. Sherman was with him in the car but that in the confusion surrounding the arrest she slipped away unnoticed. The defense contended that it was unable to locate Ms. Sherman to testify at the trial.

Although there were numerous motions and memoranda filed in this case, we are primarily concerned in Anthony's direct appeal with a motion to suppress the evidence gathered from the search of Anthony's residence and a motion for a new trial based upon governmental misconduct. Both motions were denied

by the trial court. Dr. Sisney's appeal stems from Anthony's post-trial motions for a new trial on the basis of newly discovered evidence and for discovery of certain tapes, including tapes of conversations intercepted from the Sisney household [hereinafter referred to as the Sisney tapes]. These motions were made while Anthony's direct appeal was pending in this court. In response to Anthony's motion for discovery of the tapes, Dr. Sisney filed a motion to intervene for the purposes of opposing Anthony's discovery motion and to move to suppress the contents of the tapes obtained by the tap on his phone. The trial court denied Sisney's motion and granted Anthony's motion for discovery to the extent of an *in camera* review of the tapes by defense counsel for the limited purposes of presenting evidence on the motion for new trial. This court stayed the trial court's order pending this appeal by Dr. Sisney.

In Anthony's direct appeal from his conviction, he presents four contentions of error involving (1) the sufficiency of the affidavit for the search warrant authorizing the search of Anthony's residence; (2) the propriety of the trial court's action in denying his motion for a new trial based upon governmental misconduct; (3) the effect of certain jury instructions; and (4) the application of the Jencks Act.

In the Sisney appeal, two issues are presented. First we must decide whether or not the trial court erred in finding that Sisney did not have standing to oppose Anthony's discovery motion, and second, whether the trial court's order granting Anthony limited discovery of the tapes was error.

We affirm Anthony's conviction for unlawful interception of wire communications in violation of 18 U.S.C.A. § 2511(a). We reverse the trial court's order granting discovery of the Sisney tapes.

I.

Anthony alleges that the trial court erred in finding that the affidavit supporting the search warrant issued for the search of his residence contained sufficient information to establish probable cause to believe that evidence of illegal wiretapping would be found there.

The affidavit executed by F.B.I. Agent Copeland basically set forth the circumstances leading up to Anthony's arrest and recited that Anthony's address was listed on a car rental agreement for the Oldsmobile, that upon being booked Anthony gave the same address and that Agent Copeland had personally observed the residence which he described. The affidavit also described the device used to intercept communications from the Sternlof phone. Based upon these facts, Agent Copeland stated that he had reason to believe that proofs of purchases of electronic equipment and other evidence in the form of electronic equipment were being concealed at the Anthony residence.

Our review of the sufficiency of an affidavit for a search warrant is limited and we will give deference to the issuing magistrate's determination of probable cause. *United States v. Rahn*, 511 F.2d 290 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975). In determining whether or not probable cause exists to believe that evidence of a crime will be found at the place to be searched, the magistrate is entitled to rely upon practical considerations of everyday life. *Brinegar v. United States*, 338 U.S. 160 (1949).

From the description in the affidavit of the recording device,[1] it was not unreasonable for the magistrate to assume

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[1]The statement of Special Agent Errol Lee Myers, Federal Bureau of Investigation, on February 21, 1980, that he seized and inventoried the con-

that this device had to be assembled. Taking this assumption one step further, it was reasonable to assume that Anthony might have assembled the device at his residence. *United States v. Melvin,* 596 F.2d 492 (1st Cir. 1979), cert. denied, 444 U.S. 837 (1979); *United States v. McCann,* 465 F.2d 147 (5th Cir. 1972), *cert. denied,* 412 U.S. 927 (1973). The following language from *United States v. Lucarz,* 430 F.2d 1051 (9th Cir. 1970) appropriately embodies this principle:

> The situation here does not differ markedly from other cases wherein this court and others, albeit usually without discussion, have upheld searches although the nexus between the items to be seized and the place to be searched rested not on direct observation, as in the normal search-and-seizure case, but on the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property.

430 F.2d at p. 1055. *Quoted* with approval in *United States v. Rahn, supra.*

Anthony contends that because nobody directly observed any evidence of the crime at his residence and because he had no opportunity to conceal evidence there after his arrest, it was unreasonable to assume that evidence of the crime would be found at his home. However, as we noted in *United States v.*

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tents of the device used to intercept wire communications of the residence of Dr. Richard Sternlof. The device consisted of the following:

1. Adventurer tackle box, Model 1203.
2. One PowerSonic Battery, Model PS 645, 6V. 4.5 Amp-Hr., #01830.
3. One Panasonic cassette tape recorder, AutoStop C, AC/Battery Model.
4. One Archer Telephone Recording Control device, Catalog #43236.
5. Red, black, brown and gray electrical wire and connectors.

Rahn, supra, at p. 293, "(t)he affidavit need not contain information providing '...certainty that the objects sought will be found as a result of the search.' *Porter v. United States,* 335 F.2d 602 (9th Cir. 1964), *cert. denied,* 379 U.S. 983, 85 S.Ct. 695, 13 L.Ed.2d. 574 (1965)." Nor, is it necessary for the affidavit to contain a recital that someone had personally observed evidence at the defendant's residence when it is reasonable to assume that certain types of evidence would be kept at a defendant's residence.

The main feature that distinguishes Anthony's case and the cases we have cited above from the cases Anthony cites and relies on in his brief, particularly *United States v. Flanagan,* 423 F.2d 745 (5th Cir. 1970), is the nature of the evidence believed to be concealed at the defendant's residence. The device Anthony used to effectuate his crime had to be assembled. Thus, it differs markedly from the fruits of a crime, such as stolen merchandise, which lack the necessary nexus to the place to be searched.

Moreover, Anthony's situation is more akin to that present in *United States v. Haala,* 532 F.2d 1324 (10th Cir. 1976). In *Haala* we upheld the validity of a search warrant for the search of the defendant's dormitory room in Iowa and her apartment in Minnesota. The defendant was charged with sending an explosive through the mails. The affidavit in support of the search warrant alleged that the defendant's fingerprint was found on the wrappings of the explosive, that she had a motive for sending the explosive, and that she had the knowledge to assemble the explosive. Thus, in finding that the affidavit was sufficient to establish probable cause to believe that evidence of the crime would be found at the defendant's residences we recognized that it was reasonable to assume that evidence of an assembled device would be found at the defendant's home. Similarly, we find that Agent Copeland's affidavit in support

of the search warrant for Anthony's home was sufficient to establish the requisite probable cause.

II.

As a second assignment of error, Anthony contends that the trial court erred in denying, without a hearing, his post-trial motion for new trial based on governmental misconduct. In conjunction with his appeal, Anthony filed a motion to supplement the record with the grand jury testimony of Agent Coy A. Copeland and transcripts of telephone conversations between Assistant United States Attorney Susie Pritchett and Kitty Duncan, an employee at the Bakouras Foundation, which allegedly establish the governmental misconduct.

It appears that Anthony knew of the existence of the grand jury testimony prior to trial, and although it was Jencks Act material, he did not request it. Furthermore, Anthony had knowledge of and access to the tapes of the conversations between Susie Pritchett and Kitty Duncan at the time of trial. These documents were not introduced into evidence at trial and, thus, they are not part of the record on appeal.

Prior to oral argument on appeal, this court granted Anthony's motion to supplement the record. The Government then filed a motion for reconsideration of the court's order which was denied without prejudice. At oral argument, the Government renewed this motion. On reconsideration, we now hold that Anthony's motion to supplement the record must be denied. F.R.A.P. Rule 10(e), 28 U.S.C.A., allows a party to supplement the record on appeal. However, it does not grant a license to build a new record. *Fleming v. Gulf Oil Corporation,* 547 F.2d 908 (10th Cir. 1977), *Borden, Inc. v. Federal Trade Commission,* 495 F.2d 785 (7th Cir. 1974).

Thus, in considering the issue of governmental misconduct we are confined to a review of the original record on appeal.

Anthony does not direct our attention to any specific instance of governmental misconduct appearing on the record other than some general testimony concerning the tapes of conversations between Kitty Duncan and Susie Pritchett. Regardless of the lack of evidence to substantiate the claim of governmental misconduct, we need not, in any event, reach the merits of the claim inasmuch as the trial court properly denied Anthony's motion for a new trial on the grounds that it was untimely filed. Anthony's original motion for a new trial was timely filed. However, it did not allege governmental misconduct as a ground therefor. The first allegation of governmental misconduct was made in a supplemental memorandum filed after the period for filing a motion for new trial had expired. In denying Anthony's motion, the trial court properly relied upon *United States v. Newman,* 456 F.2d 668 (3d Cir. 1972). The court there held that a defendant may not amend his motion for a new trial to include a new ground after expiration of the period prescribed by Fed. Rules Cr. Proc. rule 33, 18 U.S.C.A. Consequently we hold that the trial court did not err in denying Anthony's motion for a new trial based upon governmental misconduct.

III.

Anthony further contends that the trial court erred in refusing to give a requested instruction. The requested instruction[2] basically sets forth the defense of consent. It states that if a party to a conversation or one who has the care, custody or control of the communication equipment gives consent to an

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[2] You are instructed that it is not unlawful under this statute for an individual to intercept a wire communication where one of the parties to the communication has given prior consent to such interception or where a person who has care, custody or control of the equipment used for the transmission of the wire communication has given prior consent to such interception.

interception, then the interception is lawful. This instruction differs slightly from the instruction concerning consent that was given by the trial court.[3]

The instruction given was almost a verbatim recital of 18 U.S.C.A. § 2511(2)(d). The only difference between the two instructions is that Anthony's requested instruction included the consent of the party who had the care, custody or control of the phone as a defense. This instruction embodies Anthony's defense that a spouse of one of the subscribers of the intercepted line had given Carol Sherman consent to tap the line and that inasmuch as Anthony was working with Carol Sherman, the admitted interception was lawful.

In our view, even if a spouse had given permission to Carol Sherman to tap the phone, such permission would not render the interception legal. On the issue of legality of interspousal wiretaps *United States v. Jones,* 542 F.2d 661 (6th Cir. 1976), undertook an exhaustive review of Title III of the U.S.C.A. § 2511 under which Anthony was convicted. The court there concluded that there was no statutory exception in the Act for interspousal wiretaps.

The opposite result was reached in *Simpson v. Simpson,* 490 F.2d 803 (5th Cir. 1974), *cert. denied,* 419 U.S. 897 (1974), on which Anthony places heavy reliance. However, even though the *Simpson* court recognized an interspousal exception to the wiretapping statutes, it noted that third-party wiretapping, even with a spouse's consent, would violate the Act because it

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[3]It is not unlawful for a person not acting under color of law to intercept a wire communication where such a person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

entails a greater invasion of privacy than a tap by the consenting spouse personally. 490 F.2d at p. 809.

Accordingly, we hold that Anthony's requested instruction was an incorrect statement of the law. The court did not err in refusing to give it.

Anthony also alleges that the trial court committed plain error in giving the following instruction:

> It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done. However, evidence that the accused acted or failed to act because of ignorance of the law, is to be considered by the jury, in determining whether or not the accused acted or failed to act with specific intent, as charged.

Anthony contends that this instruction shifts the burden of proof to the defendant on the issue of specific intent which entails the determination of the willfulness of his act. If the instruction did in fact shift the burden of proof it was error to give it. *Sandstrom v. Montana,* 442 U.S. 510 (1979). The determination of whether or not an instruction shifts the burden of proof rests upon the interpretation that a reasonable juror would give to the instruction. In the *Sandstrom* case the jury was "told that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at p. 517. However, the instruction did not inform the jury that this presumption could be rebutted. In Anthony's case, not only was the jury instructed that the presumption that a person knows what the law forbids

could be rebutted, but the jurors were also instructed that they must consider ignorance of the law as bearing on the issue of specific intent.

In reviewing this instruction, together with all the other instructions, as we are compelled to do, *United States v. Beitscher,* 467 F.2d 269 (10th Cir. 1972), we hold that a reasonable juror would not have interpreted the instruction to mean that Anthony had the burden of proving a lack of willfulness in his act. The giving of an instruction did not constitute error.

IV.

We have considered Anthony's brief mention of alleged error concerning Jencks Act material and find it to be without merit. Accordingly, Anthony's conviction for unlawful interception of wire communications is affirmed.

V.

In a consolidated appeal, Dr. Vernon Sisney appeals from the trial court's determination that he was without standing to object to Anthony's motion for discovery of the illegal tapes made by Anthony in connection with his motion for a new trial based on newly discovered evidence. After determining that Sisney did not have standing, the trial court issued an order allowing Anthony *in camera* inspection of the illegal tapes for the limited purposes of presenting evidence on his motion for a new trial.

We granted a temporary stay of the trial court's order pending disposition of this appeal. Thus, we are confronted first with the question of whether or not Dr. Sisney has standing to object to disclosure of the tapes, and, secondly, whether or not

the trial court erred in allowing limited disclosure of the tapes. We emphasize that this appeal is limited to the issue of disclosure in regards to the Sisney tapes only.

Dr. Vernon Sisney was a participant in telephone conversations that were recorded without his knowledge or consent or the knowledge or consent of the other parties to the conversations, including family members and patients of Dr. Sisney. Dr. Sisney was the owner of the premises subjected to the electronic surveillance.

The Omnibus Crime Control and Safe Streets Act, 18 U.S.C.A. § 2518(10)(a) provides that,

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that --
>
> (i) the communication was unlawfully intercepted;
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> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

An aggrieved person is defined in 18 U.S.C.A. § 2510(11) as,

> "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

The trial court ruled that these statutes did not confer standing on Dr. Sisney. Relying on a footnote in *United States v. Liddy,* 354 F.Supp. 217 (D.D.C. 1973), rev'd unpublished opinion, *United States v. Liddy and Allen,* No. 73-1020 (D.C. Cir. Jan. 19, 1973) the trial court found that these statutes apply only to illegal court-authorized wiretaps and not to tapping or bugging by private individuals. We must hold that this interpretation of the statutes is clearly erroneous in light of 18 U.S.C.A. § 2518(10)(a). That subsection allows an aggrieved person to move to suppress the tapes on three different grounds, one of which is that the communication was unlawfully intercepted. The other two grounds pertain to court approved wiretaps which nonetheless are illegal because the *authorization* was insufficient or the manner of the interception exceeded the *authorization.* If Congress had intended the statutes to apply only to illegal government taps, they would logically have limited the first ground for a motion to suppress to read "interception of communications without court *authorization.*" Inasmuch as, under the Act, the government is the only entity recognized for purpose of court authorization, such limiting language would imply that the statutes apply only to illegal taps by the government. Furthermore, it is ironic to contend that these statutes do not apply to private persons for purposes of a motion to suppress in light of the fact that Anthony, a private person, was prosecuted under statutes contained in the same Act.

We hold that Dr. Sisney is an aggrieved person under the Act, that he has standing to object to Anthony's motion for

discovery of the Sisney tapes and that he has standing to bring his motion to suppress.

Anthony contends that the trial court's order granting discovery is an interlocutory order and consequently non-appealable. We recognize that a discovery order is an interlocutory order. However, we believe that the present situation comes within the exception to the rule of non-appealability set forth in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). *Cohen* recognized that certain interlocutory orders are appealable "when they have a final and irreparable effect on the rights of the parties." 337 U.S. at p. 545. Dr. Sisney's right to suppress the tapes would be totally and irreparably lost if disclosure is allowed, even under the protections afforded by the trial court's order. The present case is but one aspect of the underlying situation in Oklahoma City which has attracted widespread attention. There are too many persons involved in the underlying conflict to ensure the confidentiality of these tapes beyond the *in camera* hearing on the motion for a new trial. Consequently, we deem it necessary, in the interest of justice, to reach the heart of this matter.

VI.

We turn now to the question of whether or not Anthony is entitled to discovery of the tapes.

At the onset, Anthony contends that since he was not convicted of tapping Dr. Sisney's phone there has not been a finding that the interceptions were "in violation of this chapter," and therefore the Sisney tapes are not precluded from disclosure. The statutes prohibit disclosure of tapes when the person seeking to disclose the contents of the tapes knows or has reason to know that the tapes were illegally obtained. It is undisputed that there was no court authorization for the tap

and that Dr. Sisney did not consent to the tap. Consequently, the tapes were obtained in violation of the statutes. It is immaterial that the jury did not find beyond a reasonable doubt that it was Anthony who illegally tapped Dr. Sisney's phone.

This issue concerning disclosure of illegally intercepted communications was addressed in *Gelbard v. United States,* 408 U.S. 41 (1972). That case involved an appeal by witnesses to a grand jury proceeding from their contempt citations for refusing to answer certain questions, the answers to which would necessarily divulge the contents of illegally intercepted communications. The Court noted that 18 U.S.C.A. § 2511(1), in addition to declaring unauthorized wiretaps illegal, renders it illegal to disclose the contents of the wiretaps. In discussing the overall scheme of Title III of the Omnibus Crime Control and Safe Streets Act, the Court said,

> The purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception. Moreover, § 2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: [Footnote omitted].

408 U.S. at p. 51.

The Court further observed:

> ...to compel the testimony of these witnesses compounds the statutorily proscribed invasion of their privacy by adding to the injury of the interception the insult of compelled disclosure. And, of course, Title III makes illegal not only

> unauthorized interceptions, but also the disclosure and use of information obtained through such interceptions. 18 U.S.C. § 2511(1); see 18 U.S.C. § 2520. Hence, if the prohibition of § 2515 is not available as a defense to the contempt charge, disclosure through compelled testimony makes the witness the victim, once again, of a federal crime.

408 U.S. at p. 52.

In the instant case, the trial court recognized the *Gelbard* decision in refusing to grant Anthony's motion for disclosure of the tapes made during the course of the trial. However, in ruling upon the later motion for disclosure made in conjunction with the motion for a new trial, the trial court said that *Gelbard* and other cases had "not foreclosed the possibility that the contents of the tapes might be admissible for impeachment purposes." [Order of August 25, 1981].

In support of its conclusion that illegal wiretap evidence may be used for impeachment purposes the court relied upon *United States v. Caron,* 474 F.2d 506 (5th Cir. 1973). In *Caron*, the defendant assigned as error the trial court's admission of evidence procured by wiretap for impeachment purposes when there was no determination that the wiretap was legal. The court held that this evidence was admissible for impeachment purposes regardless of whether or not it was legally or illegally obtained. The court based this decision on the legislative history of Title III of the Omnibus Crime Control and Safe Streets Act. The legislative history of 18 U.S.C.A. § 2515 indicates that the section was not intended "to press the scope of the suppression role beyond present search and seizure law." S.Rep. No. 1097, 90th Cong., 2nd Sess. Reprinted in [1968] U.S. Code Cong. & Ad. News 2184. Normal search and seizure laws have arisen in the context of the

Fourth Amendment which is directed against the government, not against private individuals. Therefore, the search and seizure rules which allow the government to use illegally seized evidence for impeachment purposes, while applicable as in the *Caron* case to permit the government to use wiretap evidence to impeach the defendant, are not applicable to our situation inasmuch as Anthony is a private person. Thus, Fourth Amendment search and seizure rules do not come into play.

We find support for the position that a defendant charged with illegal wiretapping is precluded from using the illegal evidence to impeach a government witness in the text of Title III and the overall legislative history of the Act. Even when a wiretap is legal, the information derived from the wiretaps may only be disclosed under certain circumstances. 18 U.S.C.A. § 2517. The only circumstance that could be applicable in Anthony's case is contained in 18 U.S.C.A. § 2517(3). That subsection provides,

> *Any person who has received, by any means authorized by this chapter,* any information concerning a wire or oral communication, or evidence derived therefrom *intercepted in accordance with the provisions of this chapter* may disclose the contents of that communication...[Emphasis supplied].

In reviewing the legislative history of 18 U.S.C.A. § 2517(3) we observe that Congress recognized the use of wiretapped evidence for impeachment purposes. After repeating the text of subsection (3), it is said, "It envisons, of course, the use and disclosure of *such* evidence at trial...to impeach (People v. Hughes, 203 Cal.App.2d 598, 21 Cal.Rptr. 668 [1962]), a witness' testimony..." S. Rep. No. 1097, 90th Cong., 2nd Sess.

Reprinted in [1968] U.S. Code Cong. & Ad. News, 2188-89. In *People v. Hughes, supra.*, the court ruled that it was not error for the trial court to admit evidence of a taped conversation between the defendant and his wife and daughter for impeachment purposes. The wife and daughter consented to the interception of the conversation; accordingly, the evidence was legally obtained. Hence, we conclude that Congress did not intend to authorize the use of illegally obtained evidence for impeachment purposes. We deem this conclusion reasonable in light of the overall purposes of Title III of the Omnibus Crime Control and Safe Streets Act as set forth in the legislative history,

> Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents should be prohibited...Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. *The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings.* Each of these objectives is sought by the proposed legislation. [Emphasis supplied.]

S. Rep. No. 1097, 90th Cong., 2nd Sess. Reprinted in [1968] U.S. Code Cong. & Ad. News, 2156.

Anthony nonetheless claims that if he is denied access to the illegal tapes for impeachment purposes his Sixth Amendment right to confrontation will be effectively foreclosed. Anthony seeks to align himself with victims of illegal wiretaps by citing to *Alderman v. United States,* 394 U.S. 165 (1969), *reh. denied,* 394 U.S. 939 (1969), in which the defendant who was a victim of a wiretap sought discovery of the taped conversations. The *Alderman* court allowed discovery of the tapes to the defendant/victim under a protective order. The protective order was necessary to protect the interest of third parties not involved in the case, who were parties to the conversations. Contrary to what Anthony urges us to believe, the Court reasoned that since the defendant/victim already knew who these people were and most likely what was said, the protective order was sufficient to protect those third parties' interests.

Anthony also relies on *Davis v. Alaska,* 415 U.S. 308 (1974) and *United States v. Bates,* 617 F.2d 585 (10th Cir. 1980). Those opinions held that, for impeachment purposes, the defendant's Sixth Amendment right to cross-examination overrode the witness' statutory right to confidentiality in juvenile records. Those cases are distinguishable from the present case inasmuch as the defendants in *Davis* and *Bates* sought discovery of legally obtained evidence, whereas Anthony seeks discovery of illegally obtained evidence.

Assuming, *arguendo,* that a defendant does have a right to use illegally seized evidence to impeach the credibility of a witness, that right is not absolute. A defendant may not use discovery as a fishing expedition. Anthony has not directed our attention to any specific testimony of any witness that could potentially be impeached. Anthony simply alleges,

> The record demonstrates that, as trial witnesses, [sic] Dr. Sisney testified in contradiction to facts which appear on the tape recordings in issue, and that the tape recordings contain material of a substantially impeaching character.

[Appellee's Memorandum in Support of Motion to Dismiss Appeal and to Dissolve Stay, p. 10].

In attempting to establish the impeaching character of the tapes, Anthony constantly tries to distort the issue of his guilt by raising the propriety of Dr. Sisney's and other psychologists' actions in regard to Dr. Bakouras. In essence, Anthony would have us put Dr. Sisney on trial. Even had Dr. Sisney conspired with other psychologists to run Dr. Bakouras out of business, such evidence would not justify the interceptions or establish a lack of willfulness on Anthony's part. If such were the case, whenever a party had a grievance against another, the grievance would justify the use of illegal means to prove the validity of the grievance. This kind of conduct is exactly what the statutes are designed to control, *i.e.*, private individuals may not take the law into their own hands.

The hostility between the psychologists provides some background for the case, but it is certainly collateral to the issue of whether or not Anthony willfully intercepted wire communications without court authorization. The impeaching character of this evidence cannot be allowed to obscure the issue of Anthony's guilt.

Moreover, Anthony's case is akin to the situation presented in *United States v. Liddy*, 509 F.2d 428 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 911 (1975), wherein the appellant charged with illegal wiretapping contended that the court's refusal to disclose the contents of the tape violated his Sixth Amendment right to cross-examine. The court said,

> Appellant was given ample opportunity to cross-examine Baldwin regarding the details of the wiretapping operation, his identifications of Liddy, and his ability to identify certain voices. Although questioning regarding the contents of the conversations which Baldwin allegedly overheard might have provided an additional area in which to test his credibility, such an examination was not required to afford appellant a fair opportunity to test the truth of the direct testimony. Under the circumstances of this case, the order prohibiting disclosure of the contents of the intercepted conversations vindicated the rights of the movants without undue interference with the rights of the accused.

509 F.2d at p. 446.

In light of the voluminous record and testimony concerning the hostility between Dr. Sisney and George Bakouras with whom Anthony was associated, we have no doubt that Anthony had ample opportunity for impeachment of the government witnesses.

Anthony also charges that government attorneys committed perjury in that they informed the trial court originally that the F.B.I. had reviewed certain tapes and that the tapes contained no exculpatory material. Later, Agent Copeland of the F.B.I. filed an affidavit that represented that neither he nor the F.B.I. had listened to the "Gillespie" tapes or the "Susie Pritchett" tapes. We fail to see the connection between the alleged perjury and the issue on this appeal, which is, whether or not Anthony is entitled to the Sisney tapes for impeachment purposes.

Although Anthony's argument is somewhat vague, it appears that his contention is that disclosure of the tapes is re-

quired to determine if the tapes contain exculpatory material. Under *Brady v. Maryland*, 373 U.S. 83 (1963) the prosecution is required to disclose to the defense exculpatory material or evidence favorable to the accused. The present situation is unique in this regard. As noted in *Gelbard v. United States, supra,* disclosure of illegally intercepted communications is a crime in and of itself. It follows that if the sought-after material falls within the prohibition established in *Gelbard,* it is not admissible in evidence. Thus, if we were to require the prosecution to disclose the contents of the tapes for purposes of ascertaining whether they contain exculpatory material, we would cast the prosecution in the role of a party to a crime. The *Brady* rule is designed to insure that the defendant receives a fair trial. However, the defendant's right to a fair trial does not encompass a right to profit from the fruits of his crime. Accordingly we find no merit in Anthony's contention.

Having decided that Dr. Sisney has standing to object to disclosure of the tapes and that Anthony is not entitled to the Sisney tapes for impeachment purposes, we need not decide whether the physician-patient privilege is applicable to the tapes.

The trial court's order denying Dr. Sisney standing to object to disclosure or to move to suppress the tapes, and further granting discovery of the Sisney tapes is reversed. The stay order on disclosure is made permanent.

APPENDIX B

NOVEMBER TERM -- FEBRUARY 12, 1982

Before Honorable James E. Barrett, Honorable William E. Doyle, and Honorable James K. Logan, Circuit Judges.

No. 81-2335

UNITED STATES OF AMERICA,
Petitioner,

vs.

HONORABLE LEE R. WEST,
United States District Judge for the Western District of Oklahoma,
Respondent.

JUDGMENT AND WRIT OF MANDAMUS

This cause came on for consideration of the petition for writ of mandamus to the United States District Court for the Western District of Oklahoma and was submitted on the briefs.

Upon consideration whereof, it is ordered that the challenged order of Honorable Lee R. West, granting discovery of Office of Professional Responsibility files entered August 25, 1981, in United States v. Anthony, D.C. No. CR-80-35-W, is a clear abuse of discretion. We hold that the Office of Professional Responsibility files are irrelevant.

Honorable Lee R. West is directed by this Writ to vacate his order requiring production of the files and granting discovery of them by the real party in interest, Jack Holland Anthony.

The Clerk is directed to serve a copy of this Judgment and Writ together with a copy of the Court's opinion in the captioned cause on the parties in interest by certified mail.

/s/

HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 81-2335

UNITED STATES OF AMERICA,
Petitioner,

v.

HONORABLE LEE R. WEST,
United States District Judge for the
Western District of Oklahoma
Respondent,

JACK HOLLAND ANTHONY,
Real Party in Interest.

On Petition for Writ of Mandamus

John F. Depue, Attorney, Department of Justice, Washington, D.C., for Petitioner.

Michael E. Tigar of Tigar, Buffone & Doyle, Washington, D.C. for Jack Holland Anthony.

Before BARRETT, DOYLE and LOGAN, Circuit Judges.

BARRETT, Circuit Judge.

In this petition the Government seeks a writ of mandamus directing respondent, the Honorable Lee R. West, to vacate an order granting discovery of Office of Professional Responsibility files [hereinafter referred to as OPR files]. The order granting discovery of the files was made in response to a motion for discovery in aid of a motion for new trial on the basis of newly discovered evidence in the underlying case of *United States v. Anthony,* D.C. No. CR-80-35-W.

The facts of the Anthony case are set forth in *Anthony v. United States v. Sisney,* Nos. 80-1953, 81-2020, 667 F.2d 870 (10th Cir., Nov. 1981) and need not be repeated here. The OPR files in issue concern an investigation undertaken by the Office of Professional Responsibility, Department of Justice, in response to a complaint filed by Dr. Kay Delaporte. Dr. Delaporte was a character witness on behalf of the defendant in the Anthony trial. Following the trial Dr. Delaporte filed a complaint with the Office of Professional Responsibility alleging, *inter alia,* that: her ex-husband Chris Delaporte improperly influenced United States Attorney Larry Patton to prosecute Anthony for the purpose of harassment; Assistant United States Attorney Susie Pritchett improperly disclosed information concerning the grand jury investigation of the Bakouras Foundation; and FBI agents were abusive in serving subpoenas on personnel at the Bakouras Foundation.

In conjunction with his motion for new trial, Anthony sought production of the OPR files. The trial court issued an order directing the Government to produce the files for *in camera* inspection by the court. After the Court's *in camera* review of the files, a hearing on Anthony's new trial motion was held. At the hearing the court determined that the defense should be allowed access to the OPR files for the limited purpose of argument on the new trial motion. Subsequently, the court issued an order directing the Government to disclose the OPR files to Anthony. The order permitted the Department of Justice to object to disclosure within ten days. Thereafter, an assistant United States attorney objected to disclosure on the grounds of privilege. Inasmuch as the claim of privilege was not asserted by the agency head, the court rejected the claim and once again ordered disclosure.

On the day the OPR files were to be turned over to Anthony, a formal claim of privilege by the United States Attorney General and a motion for reconsideration were filed. In response, the court issued an order wherein it recognized the Government's claim of privilege but nevertheless ordered disclosure finding that the defendant's interest in the files outweighed the Government's interest in confidentiality. The court also found that the "interest of justice" required that all of the files be disclosed to Anthony rather than selected portions thereof.

On application of the Government, the trial court's order directing disclosure was stayed by this court pending review of the petition for writ of mandamus.

I.

Our first concern is directed to the jurisdiction of this court. Inasmuch as discovery orders are interlocutory orders not sub-

ject to review by appeal, our jurisdiction must rest upon the All Writs Act, 28 U.S.C. § 1651(a). We have held that review by mandamus of discovery orders involving allegedly privileged matters is appropriate when, "(1) disclosure of the allegedly privileged or confidential information renders impossible any meaningful appellate review of the claim of privilege or confidentiality; and (2) the disclosure involves questions of substantial importance to the administration of justice." *United States v. Winner,* 641 F.2d 825, 830 (10th Cir. 1981) *quoting* from *Iowa Beef Processors, Inc. v. Bagley,* 601 F.2d 949 (8th Cir. 1979), *cert. denied,* 441 U.S. 907 (1979).

The fact that the trial court's order limited disclosure of the OPR files for purposes of argument on the motion for new trial, does not lessen the burden on the privilege. Whether disclosure is limited to a motion or granted in the course of the trial, the privilege is still rendered worthless. Any subsequent review, even after limited disclosure, would be for naught, because the damage would already be accomplished. Thus, appellate review of the claim would be meaningless.

We also hold that disclosure of the OPR files involves "questions of substantial importance to the administration of justice." In our view, this case presents questions as to the extreme limits of relevancy and the permissible scope of a criminal trial. The case involves a privilege asserted by high level public officials and involves the internal checks of a separate branch of government. Therefore, we hold that this case presents the appropriate criteria for review by mandamus. *See United States v. Winner, supra.*

II.

We now turn to the merits of the petition. In order to obtain a writ of mandamus, the petitioning party must show that no

other adequate relief is available and that his right to the writ is clear and indisputable. *Kerr v. United States District Ct. for N.D. of Cal.*, 426 U.S. 394 (1976). The right to the writ is clear and indisputable when the petitioner can show a judicial usurpation of power or a clear abuse of discretion. *Bankers Life & Casualty Company v. Holland*, 346 U.S. 379 (1953), *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), *United States v. Winner, supra.*

Generally, the trial court has wide discretion concerning discovery matters. However, the concepts of relevancy and materiality necessarily place some limitations on the court's discretion. When executive privilege is involved, the trial court's discretion should be guided by a balancing test. *Denver Policemen's Assoc. v. Lichtenstein*, 660 F.2d 432 (10th Cir. 1981). In light of the broad discretion allowed the trial court and the strict standards of review governing mandamus, we deemed it necessary to review the *in camera* materials to ensure that our decision is based on the record as a whole. *See Allied Chemical Corp. v. Daiflon, Inc.*, ____U.S.____66 L.Ed.2d 193 (1980).

As noted above, this case centers around the issue of relevancy. In his motion for discovery, Anthony contended that the OPR files were relevant to his motion for new trial in that matters in the files would help establish his defense, i.e. that he lacked the specific intent necessary to commit the crime; that materials in the files would lend support to Dr. Delaporte's credibility which in turn would boost Anthony's credibility; and that the OPR files would establish governmental misconduct. After *in camera* review the trial court determined that the files were relevant because they, "might support the Defendant's argument, namely: that governmental misconduct by several employees did occur; that information that was exculpatory was withheld from Defendant; and that the court

had been affirmatively misled and deceived by the then U.S. Attorney, Larry Patton." [Order of Court, October 6, 1981].

While the OPR files may be relevant to the allegations of governmental misconduct, we hold that they are not relevant in relation to Anthony's defense. We recognize that we are not here reviewing the motion for new trial; even so, our review of the discovery order and its relevance to the motion for new trial necessarily entails some discussion of certain aspects of the new trial motion. A new trial based upon newly discovered evidence is appropriate only when the newly discovered evidence is more than impeaching and would have likely produced an acquittal had it been available in the first instance. *United States v. Mucci,* 630 F.2d 737 (10th Cir. 1980); *United States v. Weninger,* 624 F.2d 163 (10th Cir. 1980), *cert. denied,* 449 U.S. 1012 (1980); *United States v. Jackson,* 579 F.2d 553 (10th Cir. 1978), *cert. denied,* 439 U.S. 981 (1978); *United States v. Plum,* 558 F.2d 568 (10th Cir. 1977); *United States v. Maestas,* 523 F.2d 316 (10th Cir. 1975).

Anthony contends that the information contained in the OPR files is relevant to his defense of lack of specific intent. More specifically, Anthony claims that the OPR files will establish that he was "framed" as a result of a concerted effort by the Government and opponents of the Bakouras Foundation. As the Government points out in its petition, if this material is truly "newly discovered evidence," it has no bearing on Anthony's intent or the reasonableness of his beliefs at the time of the crime. We noted in *Anthony v. United States v. Sisney, supra,* that it is irrelevant whether or not Anthony had a legitimate grievance against the victims of the wiretap. The grievance does not provide an excuse for illegal conduct. *See also: United States v. Duncan,* 598 F.2d 839 (4th Cir. 1979), *cert. denied,* 444 U.S. 871 (1979)(no discovery of tapes establishing existence of hostility inasmuch as hostility did not provide defense). In light of the overwhelming evidence con-

necting Anthony with the crime, i.e. wearing plastic gloves, records of surveillance found at Anthony's home, and the reasonable inferences derived therefrom, it is inconceivable that any evidence of the alleged "frame up" would have produced an acquittal. *See King v. United States,* 402 F.2d 289 (10th Cir. 1968).

Beyond this, however, our careful review of the OPR files in their entirety did not reveal any evidence establishing a "frame up" of Anthony. At most, materials in the files establish some hostility between subjects of the investigation and the Bakouras Foundation.

Anthony further contends that the OPR files are relevant because they would support Dr. Delaporte's credibility, which, in turn, would boost Anthony's credibility. Dr. Delaporte testified to a close relationship between her ex-husband and United States Attorney Larry Patton. Anthony contends that the OPR files contain evidence establishing their relationship. As a general rule, newly discovered evidence which goes merely to credibility is not a sufficient ground for a new trial. *United States v. Jackson, supra.* In any event, evidence concerning the personal relationships of the ex-spouse of a character witness, even if relevant, borders upon that which is collateral, having a high potential for confusing the triable issues.

Anthony's final contention of relevancy, which is apparently the underlying reason for the trial court's order, is that the OPR files would establish that the Government deliberately withheld exculpatory information from the accused. More specifically, Anthony addresses an instance of alleged perjury by the United States Attorney in initially informing the court that an FBI agent had listened to certain tapes and that they did not contain exculpatory material. Subsequently, the FBI agent filed an affidavit wherein he stated that he had merely

monitored the tapes at intervals when they were being played for the victims for identification purposes. Our *in camera* review of the OPR files failed to uncover any reference whatsoever to this alleged perjury. Thus, discovery of the OPR files for this purpose would amount simply to a fishing expedition.

The court apparently felt aggrieved by the United States Attorney's failure to correct the impression that Chris Delaporte was not influential in Mr. Patton's appointment and that Chris Delaporte and Larry Patton had never discussed the Anthony case. The OPR files may be relevant to the allegation of governmental misconduct. However, the governmental misconduct involved here is clearly irrelevant to the issue of Anthony's guilt. Governmental misconduct is relevant to a criminal trial only if it was so prejudicial that had it not occurred an acquittal would have been the likely result. Otherwise, governmental misconduct is a matter for independent investigation and action, if warranted.

Assuming, *arguendo,* that Mr. Delaporte was instrumental in obtaining Mr. Patton's appointment and that Chris Delaporte and Larry Patton did discuss the Anthony case, we cannot hold that such conduct provides a legal excuse for Anthony's illegal activity. It can hardly be argued, in light of the evidence at trial, that Anthony was simply an innocent, unsuspecting bystander whom Chris Delaporte and Larry Patton targeted for prosecution. Absent evidence that this alleged misconduct was so grievous as to deny Anthony a fair trial, it cannot be allowed to obscure the issue of Anthony's guilt. Thus, it should properly be confined to the Office of Professional Responsibility's investigation. Anthony has utterly failed to establish how this alleged misconduct denied him a fair trial. Chris Delaporte was not a witness at the trial. The alleged misconduct of Larry Patton simply does not relate to the fairness of the trial.

Finally, we note that Anthony quotes from the transcripts of recorded conversations between Chris Delaporte and another individual. Accordingly, we can only assume that somehow Anthony already has access to much of the material contained in the OPR files. We observe that the Government excepted certain letters in the OPR files from the claim of privilege.

In view of our holding that the OPR files are not likely relevant to Anthony's case or, if so, of slight or marginal weight, and in light of the fact that Anthony apparently has the material available from other sources, we must hold that the trial court's finding that the files are relevant is clearly erroneous. Thus, the court's order directing discovery is a clear abuse of discretion. Inasmuch as we hold that the OPR files are irrelevant, we need not reach the issue of executive privilege.

Let the writ be forthwith issued.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CR-80-35-W

UNITED STATES OF AMERICA
Plaintiff,

vs.

JACK HOLLAND ANTHONY
Defendant.

ORDER

Defendant has moved for a new trial on the grounds of newly discovered evidence. The Court ordered certain materials produced for *in camera* inspection by the Court on April 29, 1981. After hearing oral arguments, the Court took under consideration the question of whether the *in camera* materials should be given to the defendant under a protective order for purposes of arguing the motion for new trial to the Court.

There are two categories of *in camera* materials which have not been disclosed to the defendant: tapes of intercepted phone conversations and certain files of the Office of Professional Responsibility.

On August 5, 1981, the Court granted Dr. Vernon V. Sisney leave to intervene for certain limited purposes. The same leave was granted Richard Sternlof, Beverly Sternlof, Steven Allen Sternlof, David William Sternlof, and Signe Elizabeth Sternlof on August 7, 1981. The applicants seek to prevent disclosure to the defendant of intercepted telephone conversations. Additionally, they contend that these intercepted communications should be suppressed and destroyed. The defendant has filed a Memorandum Regarding Disclosure and a Memorandum Concerning the Applications of Vernon V. Sisney and the Sternlofs. The Government has filed a Memorandum of Law In Re Disclosure of Certain Ilegally Intercepted Tape Recordings and a Reply to the Defendants' Memorandum Concerning Disclosure of In Camera Materials.

The applicants allege that they are "aggrieved persons" within the meaning of 18 U.S.C. § 2510(11) and § 2518 and that as such they have standing to suppress the tapes. In *United States v. Liddy*, 354 F.Supp. 217 (D. D.C. 1973), n.1 at 219, the Court states that these statutes refer only to illegal court-authorized wiretaps and not to tapping or bugging by private individuals. Additionally, the applicants here are not directly involved in the trial. For these reasons, the Court finds that the applicants lack standing to suppress the tapes.

The Court is aware of cases which hold that illegally intercepted wire communications cannot be introduced in evidence irrespective of whether such a prohibition forecloses a proper area of cross-examination. Additionally, the Court is not insensitive to the privacy concerns of the victims. Nevertheless, in its previous orders, the Court has not foreclosed the possibility that the contents of the tapes might be admissible for impeachment purposes. (See Court's Order of May 15, 1980).

Considering the constitutional rights of the defendant to a fair trial and to confrontation of witnesses against him, the Court finds that the interests of justice would best be served by disclosure of all *in camera* materials to the defense for the limited purpose of argument to the Court in connection with defendant's Motion for New Trial. The Court has expressed its reluctance to substitute its judgment as to exculpatory or impeachment value of certain evidence for that of defense counsel. After examining the materials *in camera*, it has become clear to the Court that arguments of counsel with respect to the evidence and perhaps even an evidentiary hearing will be required to decide whether defendant is entitled to a new trial.

The Court has agreed that no part of the files of the Office of Professional Responsibility shall be provided to the defendant before the Government, if it objects to disclosure, has the opportunity to exercise executive privilege with respect to all or part of the materials to be disclosed. The Government is hereby notified of the Court's intention to disclose to the defendant the materials which the Court has inspected *in camera*. These materials will be disclosed under the protective order of the Court that they be used solely for the purpose of argument to the Court with respect to the defendant's Motion for New Trial. The Government has 10 days from the date of this order to object to disclosure.

If no objection is made, the Government has 10 days thereafter to provide the defendant the opportunity of examining and copying, at his own expense, all *in camera*, materials including all tapes and other exhibits which have been provided to the Court for *in camera* inspection.

IT IS ORDERED AND ADJUDGED that such materials, if provided, are provided for the exclusive use of the defendant for purposes of argument with respect to defendant's Motion

for New Trial in this case only and are not to be revealed to any other person or used for any other purpose.

Defendant has 20 days after receiving the materials to file a supplemental brief under seal in accordance with the protective order and the Government has 10 days thereafter to file its response under seal.

IN CONCLUSION, the Motions to Suppress of Vernon Sisney and the Sternlofs are DENIED for lack of standing. Disclosure of the tapes under protective order is ordered and disclosure of the files of the Office of Professional Responsibility under protective order is ordered unless the Government files an objection within ten days. Additionally, a schedule for further briefing is set out.

IT IS SO ORDERED this 25th day of August, 1981.

/s/ Lee R. West

UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CR-80-35-W

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JACK HOLLAND ANTHONY,
Defendant.

ORDER

The Court's Order of September 15, 1981, directing the United States to disclose to the Defendant the investigative file of the Office of Professional Responsibility (OPR file) concerning its investigation of allegations of misconduct of Government employees during the conduct of this case was stayed pending consideration by the Court of the Government's motion for Reconsideration and the Defendant's Response to Mo-

tion for Reconsideration. The Court has considered the Motion and Response, the authorities cited by both parties, and has reviewed the proceedings in this case to date, and makes the following finding with respect to the Government's Motion to Reconsider.

The Government asks the Court to determine whether the defendant's need for the information, if any, is so compelling as to outweigh the Attorney General's claim of privilege and whether there is an overriding justification for public disclosure of the privileged information. They caution that in making this assessment, "the Court can and should weigh in the gravest manner possible the Attorney General's considered judgment as to the impact of the production sought upon the public interest."

The Government claims two privileges – a consultative privilege which "shields information reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated and an investigative privilege based primarily upon the harm to law enforcement efforts which might arise from public disclosure of investigatory files." The Attorney General asserts that the further success of investigations conducted by the Office of Professional Responsibility and indeed his own ability to perform as Attorney General would be compromised by the Order of the Court to turn over these files to the Defendant.

The Defendant asserts that no matter what the asserted national interest, the Government does not have the choice of withholding these relevant materials without a correlative duty to pay the price: dismissal, or the granting of the Defendant's Motion for New Trial.

This is not an issue that the Court has considered hastily. The Court has been considering Defendant's Motion for New

Trial since April 14, 1981. During that time, it has reviewed the OPR files "*in camera*". After considerable deliberation and balancing of interests, the Court ordered the files produced under a very narrow protective order, allowing Defendant to use them only for the purposes of argument to the Court on his Motion for New Trial. After giving careful consideration to the Government's latest contentions, the Court is still of the opinion that justice requires the production of the documents held by the Government before ruling on Defendant's Motion for New Trial.

The Government resists disclosure because the file contains "...in part, internal memoranda reflecting investigative analysis and reports by members of the OPR staff and others and recommendations as to appropriate findings and actions." Yet the Government itself, when first ordered to disclose the files, resisted disclosure of the factual data upon which such reports were based and told the Court that the "findings and conclusions of the Office of Professional Responsibility are dispositive of the defendant's claim..." and that a review of the complete file was not necessary. The Government voluntarily released to the defense, the public, and the Court the conclusions of the Office with respect to Larry Patton and Chris Delaporte, which purported to absolve the two of any misconduct, claiming such disclosure was sufficient.

Such selective disclosure on the part of the Government cannot be condoned. The Government cannot release reports and conclusions of its own investigation absolving some Government employees of misconduct and claim privilege with respect to those portions of the file which might support the Defendant's arguments, namely: that governmental misconduct by several employees did occur; that information which was exculpatory was withheld from Defendant; and that the Court had been affirmatively misled and deceived by the then U.S. Attorney, Larry Patton.

As the Court stated in *Elson v. Bowen,* 436 P.2d 12 (Nev. 1966) at 16:

> Government cannot break the law to enforce the law, *People v. Cahan,* 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513 (1955), and it follows that government should not be allowed to use the claims of executive privilege and departmental regulations as a shield of immunity for the unlawful conduct of its representatives. (See *Rosee v. Board of Trade of City of Chicago,* 36 F.R.D. 684 (N.D. Ill. 1965); also *Giancana v. Johnson,* 335 F.2d 372 (7th Cir. 1964).

The Court is aware that the Government has a serious need to keep private its internal consultations and investigations. However, in this case, the following factors must also be considered. This is a criminal case in which a defendant's personal liberty is at stake. The Governmental interests to be protected are not national security interests or state secrets. The files reflect an investigation of alleged wrongdoing by Government employees in conducting the investigation and prosecution of this case. While the public interest in the Attorney General's ability to function without interference is indeed great, even greater is the public interest in maintaining the integrity of the judicial system and the adversary system of criminal justice.

Here we have allegations of misconduct on the part of several Government employees, within and without the Justice Department. The Government has released favorable findings and conclusions with respect to some but not all of those employees. The materials sought contain unfavorable elements which are relevant to this case.

In addition, the Court is acutely aware of the fact that prior to the trial of this case the U.S. Attorney charged with wrong-

doing made direct representations to the Court which were later refuted by affidavits submitted by an F.B.I. agent. Further, during the course of the trial, the Court was led to believe that Chris Delaporte had no influence over the appointment of the U.S. Attorney or the conduct of the prosecution of the case. Subsequently disclosed evidence is, perhaps, subject to a different interpretation.

Weighing all of the factors for and against disclosure, the Court concludes that justice can only be served by full and complete disclosure to the Defendant of all the facts before ruling on the Motion for New Trial.

As the Court said in *U.S. v. Nixon*, 418 U.S. 683 (1974),

> But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S., at 88, 79 L.Ed. 1314. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed *either by the prosecution or by the defense.*

* * *

> [T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice.

418 U.S. at 709, 712-13 (emphasis added; footnotes omitted).

In addition to balancing Defendant's need to know against the Government's privilege, the Court has also considered whether the Court could assess the privilege on an item by item basis or if certain portions of the material could be protected from disclosure as was done in the recent Tenth Circuit case of *Denver Policemen's Protective Assoc. v. Lichtenstein,* No. 80-1313 slip op. (10th Cir., Sept. 18, 1981). At this stage of the proceedings the Court's Protective Order does provide protection to the Government against any harm which might come from the Defendant for purposes of argument to the Court in connection with Defendant's Motion for New Trial. However, under the totality of facts and circumstances of this case, justice can only be served by full and complete disclosure to the Defendant of all the facts.

Accordingly, the Government's Motion for Reconsideration is DENIED. The Government is ordered to take possession of the *in camera* materials from the Court and deliver them to the

Defendant under the Protective Order as set out in this Court's Order of September 15, 1981, by Tuesday, October 13, 1981 at 1:00 p.m. Defendant has 20 days thereafter to supplement his motion for new trial and the Government has 10 days to respond.

IT IS SO ORDERED this 6th day of October, 1981.

/s/ Lee R. West

UNITED STATES DISTRICT JUDGE

APPENDIX E

NOVEMBER TERM - February 5, 1982

Before Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges.

Nos. 80-1953, 81-2020

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK HOLLAND ANTHONY,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK HOLLAND ANTHONY,
Defendant,

VERNON V. SISNEY,
Applicant in Intervention-Appellant.

This matter comes on for consideration of appellant's petitions for rehearing and suggestion for rehearing in banc in the captioned causes.

Upon consideration whereof, the petitions for rehearing are denied by the panel to whom the cases were argued and submitted.

The petitions for rehearing having been denied by the panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied. Circuit Judges Holloway and Seymour recused themselves and did not participate in consideration of the in banc matter.

/s/ _____
HOWARD K. PHILLIPS, Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Cr-80-35-W

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JACK HOLLAND ANTHONY,
Defendant.

ORDER

The Government has objected to the disclosure of the files of the Office of Professional Responsibility on the grounds of work product and separation of powers. The Government asks that the files be made a part of the record and transmitted to the Tenth Circuit in connection with the oral arguments set for September 30, 1981. The Government states that it has grave reservations as to whether this Court has jurisdiction to order

disclosure or consider a motion for new trial while an appeal is pending. The Government cites no authority in support of its grave reservation. Inasmuch as this Court has had the defendant's Motion for New Trial on the grounds of newly discovered evidence under active consideration since April of 1981; has spent extensive time reviewing in camera exhibits; has considered extensive briefing by the parties and heard oral arguments and conducted in chamber conferences, the Court would expect a citation of authority with respect to the Government's belatedly adopted position that the Court lacks jurisdiction.

The Government cites as authority for withholding the materials the work product doctrine as set forth in *Hickman v. Taylor,* 329 U.S. 495 (1946) and a generalized claim of separation of powers between the executive and judicial branches, citing *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), and other cases.

A generalized claim of executive privilege cannot prevail over the due process damands of all relevant evidence in a criminal trial. *U.S. v. Nixon,* 418 U.S. 683 (1974).

Work product is a limited privilege which covers documents and tangible things prepared in anticipation of litigation or for trial and by or for another party (or by or for that other party's representative). The work product doctrine is simply inapplicable to the facts and circumstances surrounding this Court's order for production. Moreover, even if work product were applicable, where relevant and non-privileged facts exist which are essential to the preparation of a case, or which might be useful for purposes of impeachment or corroboration, their disclosure can be ordered. *Hickman v. Taylor, supra.*

The Government previously stated to the Court, "It is *not* our position...that the Department can resist an order of disclosure and avoid the consequences; it is our position that

the Government can exercise executive privilege with respect to its internal reports with the knowledge that such an election might result in the granting of the defendant's motion for new trial and/or such other remedy as the Court deems appropriate." As the Government correctly pointed out in its previous belief on the executive privilege,

> "The rationale of the criminal case is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *United States v. Reynolds,* 345 U.S. 1, 12 (1953).

Now the Government does seek to resist the order of disclosure on the grounds of a generalized claim of separation of powers and a claim of work product.

The requirements for invoking executive privilege are set out in *United States v. Reynolds,* 345 U.S. 1, 7-8 (1953):

> There must be a formal claim of privilege lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.

These requirements have not been met.

The burden is the Government's to decide whether the public prejudice of allowing a crime to go unpunished is greater than that attendant upon the possible disclosure of confidential information in the Government's possession, and the Government cannot shift that burden to the trial judge. *Jenks v. United States,* 353 U.S. 657 (1956).

The Government's assertion of a generalized separation of powers and work product after stating to the Court that it was *not* the Government's position that it could resist disclosure and avoid the consequences is an attempt to shift the burden to the trial judge. The Government's objection to the disclosure of the files of the Office of Professional Responsibility on the grounds of work product and separation of powers is DENIED. The Government's request to make the materials a part of the record for purposes of oral argument to the Tenth Circuit on September 30, 1981, is DENIED. The Government is ordered to produce the materials previously submitted to the Court together with the tapes, all under the protective order set out in this Court's order of August 25, 1981, by Monday, September 21, 1981, at 1:00 p.m.

Defendant has 20 days thereafter to submit a supplemental brief in support of its Motion for New Trial and the Government has 10 days thereafter to respond.

IT IS SO ORDERED this 15th day of September, 1981.

/s/ Lee R. West

UNITED STATES DISTRICT JUDGE

Opposition

Office - Supreme Court, U.S.
FILED
MAY 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1897

In the Supreme Court of the United States

OCTOBER TERM, 1981

JACK HOLLAND ANTHONY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOHN F. DEPUE
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the court of appeals properly issued a writ of mandamus barring disclosure of a privileged government investigative file that contained no evidence relevant to the criminal prosecution in connection with which disclosure was sought.

2. Whether, in connection with his motion for a new trial based upon newly discovered evidence, petitioner was entitled to disclosure of tape recordings of illegally-intercepted telephone conversations even though it was apparent that the recordings provided no basis for granting a new trial.

3. Whether the affidavit, accompanying an application for authorization to search petitioner's home, established probable cause.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1897

JACK HOLLAND ANTHONY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction (Pet. App. 1a-24a) is reported at 667 F.2d 870. The opinion of the court of appeals granting the government's petition for mandamus (Pet. App. 27a-35a) is reported at 672 F.2d 796. The orders of the district court (Pet. App. 36a-46a, 49a-52a) are unreported.

JURISDICTION

The judgment of the court of appeals affirming petitioner's conviction was entered on November 24, 1981, and a petition for rehearing was denied on February 5, 1982 (Pet. App. 47a-48a). The judg-

ment of the court of appeals providing for the issuance of a writ of mandamus was entered on February 12, 1982. The petition for a writ of certiorari was filed after an extension on April 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of unlawful interception of wire communications, in violation of 18 U.S.C. 2511(1)(a). He was sentenced to three years' imprisonment, with all but six months of his sentence suspended.

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 3a-4a). The evidence showed that petitioner, then a graduate psychology student, was apprehended by FBI agents while servicing a telephone interception device attached to the telephone of Dr. Richard Sternlof in Oklahoma City, Oklahoma. At the time of his arrest, petitioner was associated with the Barkouras Foundation, an organization founded by Dr. George Barkouras. The Barkouras Foundation espoused controversial theories of psychological treatment and was engaged in a professional dispute with other factions of the local mental health community. Dr. Sternlof and Dr. Vernon Sisney, another victim of petitioner's unauthorized wiretaps, were among the professional critics of Barkouras' theories.

After petitioner's arrest, a federal magistrate issued a search warrant for petitioner's residence. The search resulted in the seizure of a quantity of electronic equipment, blank and recorded cassette tapes, file folders bearing the names of Dr. Sternlof and Dr. Sisney, and other incriminating evidence. Evi-

dence seized from petitioner's residence was later admitted against him at trial.

At trial, petitioner testified that in January 1980 he was enlisted by a woman named Carol Sherman to assist in conducting a private investigation of opponents of the Barkouras Foundation. According to petitioner, Sherman provided him with tape recordings of conversations of Drs. Sisney and Sternlof and told him that the conversations had been electronically intercepted with the consent of the spouse of one of the subscribers to the intercepted line. Petitioner testified that Sherman's representations led him to believe that it was legal for him to conduct additional interceptions of Dr. Sternlof's line (Tr. 3450-3451; Pet. App. 4a). He also stated that Sherman accompanied him to the scene of the interception on the night he was apprehended but that she slipped away during the confusion accompanying his arrest. Petitioner was unable to locate Sherman at the time of trial (Pet. App. 4a).

Dr. Kay Delaporte, a psychologist and an employee of the Barkouras Foundation, testified on petitioner's behalf as a character witness. On cross-examination, she stated that she and her former husband, Chris Delaporte, had been friends of the then United States Attorney, Larry Patton, but that her friendship with Patton had ended following her bitter divorce (Tr. 3762-3763). During redirect examination, Dr. Delaporte testified that her husband, who had served as President Carter's campaign manager in Oklahoma, had been instrumental in securing Patton's appointment as United States Attorney. She also stated that she had no personal knowledge whether her husband and Patton had discussed the investigation of petitioner or his impending trial (Tr. 3766-3768).

3. After trial, Dr. Delaporte filed a complaint with the Department of Justice's Office of Professional Responsibility (OPR). She alleged, among other things, that a grand jury investigation of Dr. Barkouras and the Barkouras Foundation had been initiated and pursued for purposes of harassment and as the result of her former husband's influence with Patton. She alleged that Susie Pritchett, an Assistant United States Attorney in Patton's office, had made unauthorized disclosures of information relating to the investigation and that FBI Agents had behaved improperly toward Barkouras Foundation employees while serving subpoenas. After conducting an investigation, OPR found that there was no basis for most of Dr. Delaporte's allegations. OPR did conclude, however, that Pritchett had disclosed investigative materials without authorization and that an FBI agent had made unprofessional comments while executing a subpoena. OPR recommended that appropriate disciplinary actions be taken in both cases. OPR's findings and recommendations were forwarded to the Director of the Executive Office for United States Attorneys, who is empowered to act on behalf of the Attorney General in personnel matters involving employees of the United States Attorney's offices (Pet. App. 29a).

4. Following his conviction, petitioner moved for a new trial under Fed. R. Crim. P. 33 on the basis of a claim of newly discovered evidence. In a memorandum of law accompanying his motion, petitioner claimed that newly discovered evidence established bias on the part of Drs. Sternlof and Sisney, who had testified for the prosecution at trial. According to petitioner's memorandum, the evidence proved that Drs. Sternlof and Sisney were conducting a campaign

against the Barkouras Foundation.[1] Petitioner also alleged that newly discovered evidence showed that Patton and Chris Delaporte had discussed his case and that their conversations reflected animosity toward the Barkouras Foundation. Petitioner contended that those conversations supported his defense that Sherman had set him up as part of a government conspiracy (App. 3-14).[2]

In connection with his new trial motion, petitioner moved for an order requiring the government to produce his illegal tape recordings of conversations of Drs. Sisney and Sternlof. Before trial, United States Attorney Patton had represented that an FBI agent had listened to the recordings and had concluded that they did not contain any exculpatory material. Following petitioner's conviction, however, the agent stated in an affidavit that he had only monitored the tapes at intervals when they were played for the victims (Pet. App. 23a).

Dr. Sisney filed a motion to intervene for the purpose of opposing petitioner's discovery motion. After ruling that Dr. Sisney lacked standing, the district court ordered the government to produce the tapes for review by the defense (*id.* at 38a). The court of appeals then issued an order staying disclosure of the recordings pending Dr. Sisney's appeal.[3] The

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[1] In support of this claim, petitioner proffered tape recordings of telephone conversations of Dr. Sternlof, Dr. Sisney, and others.

[2] "App." refers to the appendix to the government's mandamus petition in the court of appeals.

[3] Dr. Sisney's appeal of the discovery order was consolidated with petitioner's direct appeal of his conviction (see Pet. App. 2a-3a).

court of appeals later held that Dr. Sisney had standing to oppose disclosure and that petitioner was not entitled to discovery of the contents of the calls that he had illegally intercepted. The court held that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, bars a defendant charged with illegal wiretapping from using the fruits of his crime to impeach prosecution witnesses (Pet. App. 13a-24a).

5. In connection with his new trial motion, petitioner also sought disclosure of OPR's file concerning its investigation of Dr. Delaporte's allegations. Petitioner asserted that material in the file would show that he lacked the specific intent necessary to commit the crime for which he had been convicted. He also claimed that material in the file would buttress Dr. Delaporte's credibility and prove government misconduct (Pet. App. 32a; see App. 14).

After inspecting the OPR file in camera, the district court directed the government to disclose its contents to the defense for the purpose of aiding further argument on the new trial motion (Pet. App. 29a; App. 59-61). The government asserted that the file was protected by executive privilege, but the court rejected the claim because it had not been asserted by the agency head (App. 62-67; Pet. App. 29a). The Attorney General then asserted the privilege personally (App. 68-79), but the district court adhered to its earlier ruling.[4] While recognizing that

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[4] The Attorney General's claim of privilege embodied two common law privileges available to the government. The first of these, which is commonly called a "consultative" or "deliberative" privilege, shields information " 'reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and

the government had "a serious need to keep private its internal consultations and investigations" (Pet. App. 43a), the court held that the defendant's interest in disclosure was preponderant (*id.* at 43a-46a). The court observed that material in the file might show that there had been misconduct by several government employees, that the government had withheld exculpatory information, and that Patton had misled the court (*id.* at 40a-46a).

The court of appeals first stayed disclosure of the OPR file and subsequently issued a writ of mandamus permanently blocking the revelation of its contents. After reviewing the file in camera, the court concluded that while its contents might be relevant to allegations of governmental misconduct, they were not at all relevant to petitioner's defense or to his new trial motion (*id.* at 25a-26a, 31a, 35a).

The court addressed each of the claims advanced by petitioner to establish the file's relevance. Petitioner contended (see *id.* at 31a) that the file would reveal a concerted effort by the government and opponents of the Barkouras Foundation to "set him up" and

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policies are formulated.'" *United States* v. *Winner*, 641 F.2d 825, 831 (10th Cir. 1981), quoting *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967). See *Peck* v. *United States*, 88 F.R.D. 65, 69 (S.D.N.Y. 1980) (applying the consultative privilege to an OPR file).

The second pertinent privilege, commonly termed the "investigative files" privilege, protects "the need for uninhibited disclosure to the government [and] reflects a concern that the government will be deprived of needed information unless its confidentiality is honored." *Peck* v. *United States*, *supra*, 88 F.R.D. at 69; see *Cooper* v. *Department of the Navy*, 558 F.2d 274, 277 (5th Cir. 1977); *Machin* v. *Zuckert*, 316 F.2d 336, 339 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963).

that such proof was relevant to his defense of good faith and lack of specific intent. However, the court of appeals found no evidence of such a scheme in the file. In addition, the court held that any such evidence had "no bearing on [petitioner's] intent or the reasonableness of his beliefs at the time of the crime" and that in light of the "overwhelming evidence" against petitioner, it was "inconceivable that any evidence of the alleged 'frame up' would have produced an acquittal" (Pet. App. 32a-33a).

The court next turned to petitioner's argument that the OPR file might enhance Dr. Delaporte's credibility as a character witness by substantiating her testimony concerning the close relationship between Patton and her ex-husband (*id.* at 33a). Observing that newly discovered evidence relating solely to credibility is not generally grounds for a new trial, the court stated that "evidence concerning the personal relationships of an ex-spouse of a character witness * * * borders upon that which is collateral, having a high potential for confusing the triable issues" (*ibid.*).

Finally, the court rejected petitioner's claim that the file was relevant because it contained evidence of governmental misconduct (Pet. App. 33a). The court found that the misconduct alleged did not provide a legal excuse for petitioner's unlawful activity and was therefore "clearly irrelevant to the issue of [his] guilt" (*id.* at 34a). The court concluded that the "trial court's finding that the files are relevant is clearly erroneous" (*id.* at 35a). As a result, the court found it unnecessary to reach the issue of executive privilege (*ibid.*).

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner contends (Pet. 9-10) that the court of appeals erred in issuing a writ of mandamus directing the district court to vacate its post-trial discovery order. Petitioner's claim lacks merit.

This Court recently summarized the limited circumstances in which a writ of mandamus may properly be issued (*Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (citations omitted)):

> [T]he writ of mandamus "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so' " * * *. Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy * * *. In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires * * * and that he satisfy the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.' "

While the requirements for issuing a writ of mandamus are stringent, they were clearly met in the present case. Not only would compliance with the discovery order have rendered any subsequent appellate review largely meaningless, but in requiring disclosure of the OPR file, the district court far exceeded its limited authority to entertain a motion

for a new trial while the case was pending on appeal. Rather than considering whether petitioner had proffered any newly discovered evidence that justified the granting of a new trial, the court ordered the disclosure of a government investigative file so that petitioner could search for such evidence. The Attorney General asserted that the file was privileged and that the disclosure of its contents would harm important governmental interests by impairing OPR's ability to conduct future investigations. The court recognized the government's "serious need to keep private its internal consultations and investigations" (Pet. App. 43a). Nevertheless, it rejected the Attorney General's claim even though the information in the file was not even relevant to petitioner's defense, let alone of sufficient importance to outweigh the interests that the privilege is designed to protect or to justify the granting of a new trial. Under these circumstances—where the district court far exceeded its authority and provoked a potentially serious conflict with the Executive Branch concerning privileged materials of no relevance to the case at hand—the court of appeals acted properly in issuing a writ of mandamus.

The issuance of the writ in the present case is supported by numerous decisions of the courts of appeals holding that mandamus is an appropriate vehicle for reviewing orders that compel the production of documents or the giving of testimony that is claimed to be privileged.[5] As the court explained

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[5] See *United States* v. *Winner*, *supra*, 641 F.2d at 830 (law enforcement investigative privilege asserted by Deputy Attorney General); *Iowa Beef Processors, Inc.* v. *Bagley*, 601 F.2d 949, 953-954 (8th Cir. 1979) (confidential business information); *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d

in *Iowa Beef Processors, Inc.* v. *Bagley*, 601 F.2d 949, 955 n.7 (8th Cir. 1979):

> The rationale for invoking mandamus in such situations is twofold: (1) disclosure of the allegedly privileged or confidential information renders impossible any meaningful appellate review of the claim of privilege or confidentiality; and (2) the disclosure involves questions of substantial importance to the administration of justice.

Accord, *United States* v. *Winner*, *supra*, 641 F.2d at 830. For the reasons already explained, both of these factors are clearly present here.

Petitioner relies (Pet. 9) upon this Court's statement in *Will* v. *United States*, 389 U.S. 90, 98 (1967), that it has "never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal." However, this Court has never held or stated that the writ may not be used to review such an order where, as in this case, the strict requirements for the issuance of the writ are plainly met.

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596 (8th Cir. 1977) (en banc) (attorney-client privilege); *Usery* v. *Ritter*, 547 F.2d 528 (10th Cir. 1977) (disclosure of identity of informer); *Breed* v. *United States District Court*, 542 F.2d 1114 (9th Cir. 1976) (disclosure of personnel and inmate files of state youth authority); *Pfizer, Inc.* v. *Lord*, 456 F.2d 545 (8th Cir. 1972) (attorney-client privilege); *United States* v. *United States District Court*, 444 F.2d 651 (6th Cir. 1971), aff'd, 407 U.S. 297 (1972) (disclosure to conspiracy defendant of his monitored conversations); *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided Court, 400 U.S. 348 (1971) (attorney-client privilege); *Hartley Pen Co.* v. *United States District Court*, 287 F.2d 324 (9th Cir. 1961) (disclosure of secret formula acquired under license forbidding disclosure).

Furthermore, the order requiring disclosure of the OPR report was not an "interlocutory procedural order" in the usual sense. It was entered after petitioner was convicted and sentenced and while his direct appeal was still pending. Thus, many of the considerations that generally militate against piecemeal criminal appeals were inapplicable. See, *e.g.*, *DiBella* v. *United States*, 369 U.S. 121, 124 (1962); *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940). In addition, when the order was entered, the court of appeals, not the district court, had jurisdiction over virtually all aspects of the case. The district court was barred from granting petitioner's new trial motion (Fed. R. Crim. P. 33). However, for the purpose of judicial economy, the Tenth Circuit,[6] like many others,[7] permits a district court judge to consider a new trial motion while the case is on appeal and to request a remand if the judge finds that grounds for a new trial are present. Accordingly, it was entirely appropriate in the present case for the court of appeals to issue a writ of mandamus to prevent the district court from grossly exceeding its strictly limited authority with respect to petitioner's motion.[8]

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[6] *United States* v. *Siviglia*, Nos. 79-1004, 79-2180 (10th Cir. June 15, 1981).

[7] See 8A *Moore's Federal Practice* ¶ 33.02 [2], at 33-11 n.26 (1981).

[8] Petitioner's reliance (see Pet. 10) upon *In re United States*, 598 F.2d 233 (D.C. Cir. 1979), and *International Business Machines Corp.* v. *United States*, 480 F.2d 293 (2d Cir. 1973), to support his contention that the court below improperly exercised its mandamus authority in reviewing an interlocutory order of the district court is misplaced. Neither case involved an assertion of privilege by the United States

2. Petitioner also claims (Pet. 11-12) that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, as interpreted by the court of appeals, violates his right to confront and cross-examine the witnesses against him. As noted, the court of appeals held that Title III barred disclosure of tape recordings of the illegally-intercepted telephone conversations of Dr. Vernon Sisney. Petitioner sought disclosure of those tapes in connection with his new trial motion and alleged in conclusory terms that they contained "material of a substantially impeaching character" (Pet. App. 22a). While we believe that the court of appeals construed Title III correctly and properly rejected petitioner's constitutional argument, we do not discuss those questions[9] because it is apparent that the tapes in question provided no grounds for granting a new trial and that consequently there was no basis for ordering their disclosure.

It well settled that a motion for a new trial on the basis of newly discovered evidence may not be granted unless the evidence was not discovered until after trial, would have probably resulted in an acquittal if admitted at trial, and is not merely cumulative or impeaching. See, *e.g.*, *United States* v. *Martorano*, 663

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and the need for immediate review of a discovery order to vindicate that assertion. Moreover, in *International Business Machines*, the court of appeals found that the Expediting Act, 15 U.S.C. 29, deprived it of jurisdiction to review by means of mandamus any interlocutory orders in civil antitrust actions initiated by the United States (480 F.2d at 295-297). Obviously, 15 U.S.C. 29, which applies only in such antitrust cases, has no application in this case.

[9] We rely upon the court of appeals' analysis (Pet. App. 16a-21a).

F.2d 1113, 1119 (1st Cir. 1981); *United States* v. *Iannelli*, 528 F.2d 1290, 1292 (3d Cir. 1976). The Sisney tapes fulfilled none of these requirements. First, the tapes were not newly discovered because their existence and whereabouts were known to the defense during trial. Petitioner was charged with illegally intercepting the conversations recorded on those tapes, and the tapes were admitted as evidence, although their contents were not revealed. Thus, the tapes can hardly be viewed as newly discovered evidence within the meaning of Rule 33. Indeed, petitioner moved unsuccessfully for disclosure of the contents of the tapes both before and during trial (Tr. 2868-2871). On direct appeal, however, he chose not to challenge the denial of those motions.

Second, the contents of the tapes had little, if any, bearing upon the charges against petitioner and were, at best, merely cumulative and impeaching. In seeking disclosure of the tapes, petitioner speculated that the recorded conversations would show that Dr. Sisney had conspired with other psychologists to destroy the Barkouras Foundation. As the court of appeals observed (Pet. App. 22a), however, the hostility of certain psychologists toward the Barkouras Foundation was totally collateral to the issue whether petitioner willfully intercepted wire communications without court authorization and provided no legal justification for such behavior. Although such evidence might demonstrate bias and reflect unfavorably upon Dr. Sisney's credibility as a government witness, such impeachment evidence could provide no basis for granting a new trial. See *United States* v. *Jackson*, 579 F.2d 553, 557 (10th Cir. 1978), cert. denied, 439 U.S. 981 (1979). Furthermore, Dr. Sisney testified at trial that he had told FBI agents investi-

gating the case that he was an "enemy" of the Barkouras Foundation (Tr. 2878). Thus, his hostility toward the Foundation and its adherents was established at trial, and any additional evidence to that effect would have been cumulative. See *United States* v. *Liddy*, 509 F.2d 428, 446 (D.C. Cir. 1974), cert. denied, 420 U.S. 911 (1975) (trial judge's order prohibiting disclosure of intercepted tapes to defense for impeachment sustained on ground that the defendant had fully explored facts to which recording was arguably relevant).

3. Petitioner's final contention (Pet. 12-13) is that the affidavit supporting the warrant authorizing a search of his residence did not contain sufficient information to establish probable cause. He argues (Pet. 13) that the affidavit failed to set forth facts specifically establishing that evidence of his illegal wiretapping activities would be found at his home. His claim is insubstantial.

The affidavit executed by an FBI agent set forth the circumstances leading up to petitioner's arrest, as well as facts establishing his place of residence. The affidavit also described the homemade device that had been used to intercept conversations on Dr. Sternlof's telephone. Based upon these facts, the agent stated that he had reason to believe that proofs of purchases of electronic equipment and other evidence in the form of electronic equipment were being concealed at petitioner's residence (Pet. App. 6a).

In determining whether there is probable cause to believe that evidence of a crime will be found at a particular place, a magistrate is entitled to rely upon practical considerations of everyday life. *Brinegar* v. *United States*, 338 U.S. 160 (1949). Thus, the nexus between the item to be seized and the place to

be searched need not be established by direct observation. Rather, the connection may rest upon reasonable inferences drawn from "the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to conceal the property sought". *United States* v. *Bowers*, 534 F.2d 186, 192 (9th Cir.), cert. denied, 429 U.S. 942 (1976), quoting *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970). See also, *e.g.*, *United States* v. *Poland*, 659 F.2d 884, 897 (9th Cir.), cert. denied, No. 81-5601 (Nov. 16, 1981); *United States* v. *Valenzuela*, 596 F.2d 824, 828 (9th Cir.), cert. denied, 441 U.S. 965 (1979); *United States* v. *Melvin*, 596 F.2d 492, 498 (1st Cir. 1979); *United States* v. *Dubrofsky*, 581 F.2d 208, 213 (9th Cir. 1978); *United States* v. *Brinklow*, 560 F.2d 1003, 1006 (10th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); *United States* v. *Spearman*, 532 F.2d 132, 133 (9th Cir. 1976); *United States* v. *Rahn*, 511 F.2d 290, 293 (10th Cir.), cert. denied, 423 U.S. 825 (1975). Here, as the court below reasoned (Pet. App. 7a-9a), the necessary nexus was established because it was obvious that the homemade electronic surveillance device petitioner was using at the time of his arrest required assembly, and petitioner's residence was the place at which that assembly was most likely to have occurred.[10]

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[10] A detailed description of petitioner's makeshift eavesdropping device, which consisted of a cassette tape recorder, wires and connectors, a recording control mechanism, and a battery all arranged in a fishing tackle box, was included in the statement of an FBI agent and attached to the search warrant application (see Pet. App. 6a-7a n.1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1982

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Petitioner's Reply Brief

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Jack Holland Anthony.

The Brief for the United States in Opposition recasts the first two questions presented and proceeds to argue from these restatements in a manner which distorts or obscures the record in these cases.

Our first question presented asks whether the mandamus power is properly used to order a trial court to reverse an interlocutory relevancy determination. The government reiterates the argument raised in the courts below that the file at issue is subject to a blanket executive privilege. We need not contest that assertion, rejected by the trial court, in the space of this memorandum; it is sufficient to note that the Tenth Circuit's mandamus opinion rests solely upon a relevancy determination contrary to that of the trial court and specifically did "not reach the issue of executive privilege." App. 35a. Moreover, to avoid the crux of this question, the government attempts to justify the relevancy determination of the court of appeals through selective reliance upon portions of the file which we have never seen. Segments of the file which have been disclosed indicate expressed intentions on the part of a government official to sabotage petitioner Anthony's appeal, clearly relevant to the defense at trial that Anthony was framed.

The second question we have requested this Court to consider is whether an alleged wiretap victim who testifies for the government may preclude disclosure of his prior recorded statements. These prior statements, referred to throughout the petition and opposition as the Sisney tapes, were said by the government to have been reviewed for *Brady* material. After the trial, it was disclosed that this representation had been false, leading to a trial court order of production. The government's opposition describes the Sisney tapes as having been obtained by petitioner Anthony illegally. This is inaccurate and obscures the fact that the jury failed to convict petitioner Anthony of having wiretapped Sisney's telephone. Indeed, there

is some indication in the record that the Sisney tapes were consensually made by another party. If any distinction is to be made between legally obtained prior inconsistent statements and those which have an illegal source, Cf. *United States v. Havens, 446 U.S. 620 (1980),* this record provides no basis for doing so.

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